



ZONING ORDINANCE INTERPRETATION

Number: 17-2

Date: June 26, 2017

Subject: Timing of Determination of MMCC Location within Drug-Free Zones and Overlay Areas, and Proximity to Sensitive Uses.

Zoning Provisions: Sec. 61-3-354(b)

This zoning interpretation is provided pursuant to Sec. 61-2-21(8) of Chapter 61 of the Detroit City Code, commonly known as the Detroit Zoning Ordinance ("Zoning Ordinance"), which authorizes the Director of the Detroit Buildings, Safety Engineering and Environmental Department ("BSEED") to render written interpretations of the text of the Zoning Ordinance.

Question Presented for Interpretation:

When considering a conditional land use application to establish a medical marihuana caregiver center ("MMCC"), what is the effective date of BSEED's determination as to whether the proposed MMCC is subject to one or more Locational Restrictions, including its location in any Drug-Free Zones or Overlay Areas, or its proximity to any Sensitive Uses?

Answer in Brief:

When considering a conditional land use application to establish an MMCC, the effective date of BSEED's determination as to whether the proposed MMCC is subject to any Locational Restrictions is the date of its decision on the land use application.

Applicable Zoning Ordinance Provisions:

Provisions of the Detroit Zoning Ordinance subject to this interpretation include:

Sec. 61-3-354. Conditional Uses; Procedures; Waivers; Public Nuisance.

...

(b) The Buildings, Safety Engineering, and Environmental Department shall not approve any request under this Chapter for a medical marihuana caregiver center:

- (1) where located in a drug-free zone, as defined in Sec. 61-3-353 of this Code, or where located within a Gateway Radial Thoroughfare overlay area or Traditional Main Street overlay area (as provided in Article XI, Division 14 of this Chapter); and



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- (2) where located on a zoning lot in a B2, B4, M1, M2, M3, or M4 zoning district less than:
- (A) One thousand (1,000) radial feet from any zoning lot occupied by any religious institution identified as exempt by the City Assessor; and
 - (B) One thousand (1,000) radial feet from any zoning lot occupied by another medical marihuana caregiver center; except that on land zoned M1, M2, M3, or M4 farther than one hundred-fifty (150) feet from land zoned residential or residential PD, the spacing requirement between medical marihuana caregiver centers shall not apply;
 - (C) One thousand (1,000) radial feet from any zoning lot occupied by a Controlled Use (other than arcade).

Interpretation:

Under the Zoning Ordinance, MMCCs are prohibited within Drug-Free Zones (as defined in Section 61-3-353 of the Zoning Ordinance) and Gateway Radial Thoroughfare or Traditional Main Street overlay areas (each as defined in the Zoning Ordinance and referred to herein as an “Overlay Area”). MMCCs are also prohibited within 1,000 feet of (1) “any zoning lot occupied by any religious institution identified as exempt by the City Assessor,” (2) “any zoning lot occupied by another medical marihuana caregiver center,” subject to certain exceptions, or (3) any zoning lot occupied by a controlled use other than an arcade (each referred to herein as a “Sensitive Use”) without the appropriate locational variances from the Detroit Board of Zoning Appeals (“BZA”). For the purposes of this zoning interpretation, these prohibitions within Drug-Free Zones and Overlay Areas or within 1,000 feet of Sensitive Uses are collectively referred to as “Locational Restrictions.”

Applications to establish an MMCC are subject to the conditional land use procedures set forth in Article III, Division 7 of the Zoning Ordinance. As part of this process, BSEED must determine whether each proposed MMCC is subject to one or more Locational Restrictions. As a general matter, it is possible for the legal status of any Drug-Free Zone, Overlay Area, or Sensitive Use to change over time. For example, a given property might cease to be used as a child care center and therefore no longer establish a Drug-Free Zone. Alternatively, the taxable status of a religious institution might change from taxable to tax-exempt, thereby imposing a spacing requirement for MMCCs. It is also possible that such changes may occur during BSEED’s review of an MMCC land use application and may affect the permissibility of the proposed MMCC. As a result, the exact timing of BSEED’s determination of whether a given MMCC is subject to any locational restrictions could affect BSEED’s ultimate decision on the application.

The Zoning Ordinance is silent as to when within the conditional land use application review process BSEED should determine whether a proposed MMCC is subject to any such locational restrictions. This zoning interpretation provides guidance on the specific ‘date of determination’ when BSEED evaluates whether a proposed MMCC is subject to any Locational Restrictions.



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Michigan courts have consistently held that when evaluating a land use application under the provisions of a zoning ordinance, “the general rule is that the law to be applied is that which was in effect at the time of [the government’s] decision,” subject to two exceptions: (1) if the revised zoning ordinance would destroy a vested property right, and (2) if the zoning ordinance was amended in bad faith and with unjustified delay. See Great Lakes Society v. Georgetown Charter Twp., 761 N.W.2d 371, 386 (Mich. App. 2008), MacDonald Advertising Co. v. McIntyre, 536 N.W.2d 249, 251-52 (Mich. App. 1995), Lockwood v. Southfield, 286 N.W.2d 87, 89 (1979).

Neither of the two exceptions that Michigan courts have identified apply to BSEED’s decisions on MMCC conditional land use applications. The first exception does not apply because MMCC applicants do not have vested property rights to operate MMCCs until their applications are actually approved. The Sixth Circuit Court of Appeals has recognized that a property owner may have a protected interest in the existing zoning classification of the property, but does not have a protected interest in a zoning classification or other benefit that has not yet been conferred and would be conferred on a discretionary basis. See EJS Props., LLC v. City of Toledo, Ohio, 698 F.3d 845, 855-57 (6th Cir. 2013). Under this standard, because the City has discretion over whether to approve MMCC land use applications, an applicant has no vested property rights that could be deprived upon BSEED’s determination that the MMCC would be subject to one or more Locational Restrictions. The second exception similarly does not apply, since no amendments to the Zoning Ordinance are at issue and thus there is no possibility for BSEED to act in bad faith or with unreasonable delay.

Therefore, in reviewing an MMCC land use application, BSEED determines whether the proposed MMCC is subject to any Locational Restrictions as those Locational Restrictions exist as of the date of BSEED’s decision on the land use application. This date of decision is reflected as the date of issuance of BSEED’s written decision letter in response to the land use application.

This zoning interpretation does not obligate, and should not be construed as obligating, BSEED to approve, approve with conditions, or deny any particular MMCC land use application based solely on the proposed MMCC’s location within one or more Drug-Free Zones or Overlay Areas, or its proximity to one or more Sensitive Uses. BSEED’s final decisions on MMCC land use applications are based on the conditional land use review process set forth in the Zoning Ordinance, including the criteria enumerated in Sections 61-3-231, 61-3-232, and 61-4-354 of the Zoning Ordinance, among other relevant factors.

Approved:

David Bell, Director